MOTION FILED
OCT 30 1981

Nos. 79-1738 and 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD NIXON,
Petitioner,
v.
A. ERNEST FITZGERALD,
Respondent.

BRYCE N. HARLOW and ALEXANDER P. BUTTERFIELD,
Petitioners,
v.
A. ERNEST FITZGERALD,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF SENATOR ORRIN G. HATCH AND REPRESENTATIVES JOHN D. DINGELL, ROBERT K. DORNAN, BARNEY FRANK, ALBERT GORE, JR., A. TOBY MOFFETT AND PATRICIA SCHROEDER, MEMBERS OF CONGRESS, IN SUPPORT OF RESPONDENT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The above named Members of Congress move this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed *amicus curiae* brief. In support of this Motion, *Amici* state:

1. All of the above named persons are current Members of the United States Senate or House of Representatives.

2. One of the most crucial concerns to Members of Congress is Congress' ability to obtain information critical to its oversight and investigative function.

3. Essential to Congress' concern is that no federal official, including the President, can, with impunity, interfere with the testimony of Congressional witnesses.

4. Petitioners argue that they are immune from liability in this case by virtue of the nature of their former positions in the executive branch. Under their theory of the case, even if they were directly responsible for Respondent's discharge, even if their motivation was punitive, and even if their conduct was designed to intimidate others from giving candid testimony to Congress, Respondent would still have no cause of action. Congress cannot effectively perform its Constitutional role if high executive branch officials are left free to intimidate employees from the executive branch whose testimony Congress requires.

5. *Amici* have received consent from counsel for Respondent Fitzgerald and counsel for Petitioners Harlow and Butterfield to file this brief. However, counsel to Petitioner Nixon has declined to provide such consent.

For the foregoing reasons, the above named Members of Congress respectfully request that their Motion for leave to file the annexed *amicus curiae* brief, be granted.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF SENATOR ORRIN G. HATCH AND REPRESENTATIVES JOHN D. DINGELL, ROBERT K. DORNAN, BARNEY FRANK, ALBERT GORE, JR., A. TOBY MOFFETT AND PATRICIA SCHROEDER, MEMBERS OF CONGRESS, IN SUPPORT OF RESPONDENT

INTEREST OF AMICI

This brief is submitted on behalf of current Members of the United States Congress. Congress has a Constitutional duty to make all laws that are necessary and proper, to oversee the execution of its laws by the execu-

tive branch, and to inform itself about the workings of every facet of government. Resolution of the central issue in this case—the degree of immunity from suit possessed by executive branch officials who violate the law and interfere with Congress' duties—has broad implications for our system of separation of powers, and could greatly affect the ability of Congress to carry out its Constitutional role. As Members of Congress, *Amici* have a strong interest in seeing that all executive branch officials, can be held accountable when they retaliate against a Congressional witness.

SUMMARY OF ARGUMENT

This brief points out the threat to the Constitutional role of Congress posed by Petitioners' contention that an individual has no judicial remedy against former high ranking executive officials who violate his Constitutional and statutory rights by punishing him for testifying before Congress.

Although no statute explicitly confers a private cause of action upon the Respondent, he has implied causes of action under both the Constitution and federal statutes. There is no basis for Petitioners' view that deliberate violations of Respondent's First Amendment rights of free speech and petition are not judicially cognizable. A private cause of action also exists under federal civil and criminal statutes enacted by Congress to prevent interference by executive officials with the testimony of government employees.

Finally, Petitioners do not enjoy absolute immunity from personal liability for intentional violations of the Constitutional and statutory rights of a Congressional witness. Petitioners are not entitled to any immunity at all because the immunity doctrine is inapplicable to conduct, such as interference with a Congressional witness, which transgresses clear statutory boundaries on the scope of Petitioners' former authority. In any event, Petitioners are entitled to no more than qualified immu-

nity. Given the countervailing interest of Congress, Petitioners cannot possibly satisfy their burden to show that public policy *requires* the extraordinary defense of absolute immunity, especially since qualified immunity provides ample safeguards to the effectiveness of the Presidency. Nor should Petitioners be afforded a special new grant of absolute immunity because of their former status or rank. This Court has expressly rejected this rationale for absolute immunity and an analysis of the historical and Constitutional underpinnings of executive immunity, as well as its function, mandates that there be no departure in this case from the general rule of qualified executive immunity.

ARGUMENT

I. A JUDICIAL REMEDY IS CRITICAL IN THIS CASE TO PROTECT CONGRESSIONAL FUNCTIONS

The ability of Congress to carry out its Constitutionally mandated responsibilities to enact laws and to oversee their execution could be crippled if this Court were to hold that there is no judicial remedy for Petitioners' alleged retaliation against a Congressional witness. For if, as Petitioners assert, high executive branch officials possess absolute immunity, even when they wrongfully dismiss a government employee solely because that employee has exercised his or her Constitutional right of free speech and testified before Congress at its request, then those officials may successfully deny Congress access to the only sources of information—government employees—who are knowledgeable about executive branch misconduct. Money damages for injuries suffered by a Congressional witness are necessary to insure forthright disclosure because no other remedy provides adequate compensation. In addition, money damages are an essential deterrent to wrongful executive intrusion into the legislative process.

A. The Importance of Congressional Oversight and Investigation

The power, and indeed the duty, of Congress to conduct inquiries into the operations of the executive branch of government, has long been recognized.[1] *See McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927). These inquiries may be in connection with proposed or existing legislation, and such legislative inquiries are an established part of representative government. *Tenney* v. *Brandhove* 341 U.S. 367, 377 (1951). This Court has noted that:

> the power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or

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[1] Former Senator Sam J. Ervin, Jr., has stressed the critical nature of Congressional oversight of executive branch operations, stating:

> Of considerable importance is Congress' power to investigate the executive branch. We do not live in a monarchy but in a democracy where government functions are shared by three equal branches. The White House is the people's house, not an imperial palace. The executive branch is not above the law. It cannot autocratically and arbitrarily block Congress from inquiring into its operations.
>
> The Constitution and statutes give Congress a solemn duty to oversee the activities of the executive branch. How else can Congress fully comprehend whether existing laws are adequate and properly administered? How else can Congress determine with confidence what specific additional laws are needed to guide the nation?
>
> The President should not be allowed to emasculate the oversight function by sweeping assertions of executive privilege. Nor should the courts establish judicial precedents that seriously debilitate this responsibility. All branches of government must fully appreciate that the oversight function is a vital tool for keeping the nation free. It is a shield against creeping executive imperialism of the sort that unfortunately our nation has witnessed in the recent past. Ervin, *Introduction* to J. Hamilton, *The Power to Probe*, at xiii (1977).

> possibly needed statutes. It includes surveys of defects in the social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal government to expose corruption, inefficiency or waste.

Watkins v. *United States*, 354 U.S. 178, 187 (1957); *accord*, *Barenblatt* v. *United States*, 360 U.S. 109, 111 (1958).

However, Congressional factfinding need not be directly tied to legislation, for even apart from its duty to conduct investigations in connection with legislation, Congress has an independent duty to inform itself about the workings of every facet of the government. The Court, quoting Woodrow Wilson, has referred to this informing function as "indispensible":

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.

United States v. *Rumely*, 345 U.S. 41, 43 (1953) (*quoting* Wilson, *Congressional Government* 303). *See also* *Watkins* v. *United States*, 354 U.S. 178, 200 and n.33 (1957).

Yet, often Congress does not have the facts required to carry out its responsibilities. In the landmark case

of *McGrain* v. *Daugherty*, 273 U.S. 135, 174-75 (1927), this Court recognized that:

> [a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who possess it.

Accord, *Barenblatt* v. *United States*, 380 U.S. 109, 111 (1958).

It is undisputed that the investigation into cost overruns on the C-5A transport plane was a legitimate exercise of Congress' Constitutional responsibilities under both its "legislative" and "informing" functions.[2] But, the only sources of information relating to the cost overruns authorized by the executive branch were the government officials, such as A. Ernest Fitzgerald, responsible for reviewing the program. In retrospect, it is clear that without his testimony, the enormous "corruption, inefficiency or waste", *Watkins*, *supra*, 354 U.S. at 187, that occurred would never have been brought to the public's attention.

Petitioners would have this Court establish a legal precedent that could defeat Congress' ability to function as a co-equal branch of government, in both its legislative and informing roles, by precluding any judicial scrutiny of executive branch misconduct. High executive offi-

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[2] There has been no suggestion whatsoever that Fitzgerald's testimony in any way compromised any national defense or security interests. Fitzgerald's testimony was given with the explicit authorization of the Department of Defense. *See Economics of Military Procurement, Hearings Before the Subcommittee on Economy In Government of the Joint Economic Committee*, 90th Cong., 2d Sess. 199-200 (1968-1969). Furthermore, this case involves restrictions on factual information desired by Congress, and not the President's discretion to develop and promulgate national policy.

cials would be free to threaten "whistleblowers" with dismissal, effectively chilling their First Amendment rights to free speech and to petition the Congress for redress of grievances.

The mere threat that civil servants could lose their jobs for providing factual information to Congress would inhibit any but the most courageous individuals. Although an employee might ultimately regain a lost job, the time and expense involved in doing so is substantial, and involves a risk that few, if any, would take. Moreover, reinstatement alone will never deter the improper dismissal of a whistleblower since the individual responsible for the dismissal is not penalized; in fact, he is often long gone from office before corrective action can be taken.

By far the better course is to allow suits for money damages. In this manner the Constitutional role of Congress will be preserved without impairing the Presidency, and the compensatory and deterrent effect of money damages will preclude the improper silencing of future Ernest Fitzgeralds.

B. Other Remedies are Inadequate or Unavailable

While there are other remedies which may, in some situations, assist the improperly dismissed employee, these remedies are not completely adequate [3] and do not safeguard Congress.

Two remedies that would theoretically serve as deterrents are as a practical matter ineffective. These remedies therefore do nothing to reduce the chilling effect on

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[3] The inability of other remedies adequately to protect whistleblowers who testify before Congress is described in *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Government Waste, Abuse and Corruption*, Senate Committee on Governmental Affairs, 95th Cong., 2d Sess. 8, 22 (Comm. Print 1978).

federal employees that fear of dismissal creates. First, Congress has the impeachment process available to it for Presidential misconduct amounting to "high crimes and misdemeanors." But invocation of such an extreme remedy for the dismissal of one individual, even when the dismissal was contrary to law, is extraordinarily improbable. Impeachment is a remedy more properly held in reserve for misconduct that affects the public at large. *See* IV J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 48, 113 (1836). Second, it is a felony to interfere with a witness before a Congressional panel. 18 U.S.C. § 1505. However, prosecution for this crime rests in the hands of the Department of Justice. It is entirely unrealistic to expect the Attorney General to bring criminal felony charges against the President or one of his aides for the dismissal of a single government bureaucrat; the executive branch, as a practical matter, will not and probably cannot investigate and prosecute itself on such a matter.[4] Not only do both of these remedies fail as an effective deterrent but neither addresses the need to compensate the harmed witness.

In fact, there are no other remedies available that fully compensate the improperly dismissed employee. As Petitioners concede, the protections under the Civil Service rule and regulations were unavailable to Fitzgerald because he was in the "excepted service." Brief for Pets. Harlow & Butterfield at 24.[5] Nor is the Civil Service

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[4] It is, of course, questionable whether a sitting President can be subjected to criminal penalties. Nixon v. Sirica, 487 F.2d 700, 756-58 (D.C. Cir. 1973) (Mackinnon, J., concurring).

[5] Yet, they maintain Fitzgerald's right to an implied cause of action must be limited because Fitzgerald was entitled to certain administrative remedies under the Veterans Preference Act of 1944, 58 Stat. 387. Petitioners thereby implicitly concede that non-veterans have an implied cause of action. It is simply inconceivable that Congress, in passing a law designed to provide

Reform Act of 1978 available to provide relief. That Act makes the improper dismissal of a whistleblower a "prohibited personnel practice," 5 U.S.C. § 2302(b)(8), and authorizes the appointment of a Special Counsel to investigate such dismissals and to recommend to the Merit Systems Protection Board appropriate remedial action, which may include removal from federal service of the offending official. 5 U.S.C. § 1207(b). However, remedial action under the statute, for quite sound Constitutional reasons, is not provided where the offenders are the President or his political appointees, such as Petitioners here. 5 U.S.C. § 1206(g)(2). This could lead to the anomalous situation where the individual who carries out the President's improper dismissal of a federal employee could himself be removed from office, but the President or Presidential aide who issues the order to fire the employee could remain untouched. *Butz* v. *Economou*, 438 U.S. 478, 506 (1978); *Halperin* v. *Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an equally divided Court*, 101 S.Ct. 3132 (1981).

We do not suggest that it is appropriate to impeach, indict or remove a President or his top aides for the offenses alleged in this case, standing alone. Surely, the respect that must be accorded the Office of the President and the special nature of his duties require that such extreme remedies be applied only in the most egregious situations. But the unavailability of extreme remedies does not mean that a less drastic remedy like money damages should also be unavailable in all cases.

Damages are hardly an extraordinary remedy; they are traditionally available in federal court for violation of individual rights. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971). A suit for damages will not disrupt the Chief Executive's ability to carry out his Constitu-

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additional protection for veterans returning from World War II, would have provided them with a remedy less meaningful than that available to everyone else.

tional functions in the way an impeachment or a criminal prosecution would. Damages would, however, deter the improper dismissal of federal employees, as well as compensate the victim of the dismissal. Consequently, only money damages adequately guarantee the full disclosure essential to the effectiveness of Congress.

II. AN IMPLIED CAUSE OF ACTION EXISTS UNDER THE CONSTITUTION

Petitioners' assertion that Respondent has no implied cause of action to challenge the violation of his Constitutional rights, *see* Brief for Pets. Harlow & Butterfield at 21-26, is simply incorrect.[6]

Beginning with *Bivens*, this Court has repeatedly recognized that victims of a Constitutional violation by federal officials have the right to recover damages against the official in federal court despite the absence of any statute conferring such a right. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Davis* v. *Passman*, 442 U.S. 228 (1979); *Carlson* v. *Green*, 446 U.S. 14 (1980).[7] A *Bivens* action may only be defeated where: (1) defendants demonstrate that Congress has provided an alternative

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[6] We take no position on whether this issue is properly before the Court, but are responding to arguments advanced by Petitioners Harlow and Butterfield that, if accepted, could adversely affect Congress.

[7] Although *Bivens*, *Davis*, and *Carlson* established implied causes of action under the Fourth, Fifth and Eighth Amendments, respectively, there is no functional difference that would justify a contrary result where a violation of First Amendment rights occur. Implied causes of action under the First Amendment have been recognized in at least five circuits. *See* Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); Rosado v. Santiago, 562 F.2d 114, 117 (1st Cir. 1977); Paton v. LaPrade, 524 F.2d 862, 869-71 (3d Cir. 1975); Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392 (6th Cir. 1975), *cert. denied*, 439 U.S. 983 (1978); Trapnell v. Riggsdy, 622 F.2d 290, 294 (7th Cir. 1980).

remedy which it *explicitly* declared to be a substitute for recovery directly under the Constitution and which it viewed as equally effective, or (2) in the absence of affirmative action by Congress, defendants demonstrate "special factors counseling hesitation," *Carlson*, *supra*, 446 U.S. at 18; *Bivens*, *supra*, 403 U.S. at 396-97; *Davis*, *supra*, 442 U.S. at 245-47. Neither of the factors necessary to defeat a *Bivens* action is present here.

A. Congress Never Explicitly Provided an Equally Effective Substitute Remedy

Fitzgerald's *Bivens* action cannot be defeated by arguing that Congress explicitly provided a substitute remedy it viewed to be equally effective as an implied Constitutional cause of action. Congress never did so. Nor does the existence of related statutory causes of action defeat Fitzgerald's claim. *Carlson*, *supra*, 446 U.S. at 19. In *Carlson*, this Court recognized a number of factors, three of which are clearly also present in this case, that suggest that a related statutory remedy does not bar an implied Constitutional cause of action under *Bivens*.

First, *Carlson* pointed out that an implied Constitutional cause of action, in addition to compensating the victim, serves an important deterrent function. To Congress, this deterrent function is critical. In order to deter wrongful discharge or intimidation, any remedy must be directed at the individual wrongdoer. Eventual reinstatement with back pay is not directed at the offending official and will not have any deterrent effect whatsoever on any official who wishes to interfere with an employee's testimony to Congress. To encourage testimony, an employee's fear of possible dismissal must be eliminated; the knowledge that lengthy administrative procedures exist that may eventually result in vindication will not suffice.[8] In addition, the criminal penalties

[8] A recent survey of federal employees by the Merit Systems Protection Board showed that "[t]here is general uncertainty about the adequacy of whistleblower protections, but most of those who venture an opinion believe they are inadequate" and that

and the threat of impeachment do not deter the harassment of an individual employee; if they did, the conduct which led to this action would never have occurred. But damages recoverable from an individual almost certainly would have a deterrent effect. *Carlson, supra,* 446 U.S. at 21.

Second, *Carlson* indicates that, unless punitive damages are available under an alternative scheme, an implied Constitutional cause of action would be the preferred method of proceeding, because punitive damages are "especially appropriate to redress the violation by a government official of a citizen's Constitutional rights." *Id.* at 22.

Third, alternative remedies do not preserve an individual's Seventh Amendment right to a jury trial. *Id.*

B. There Are No "Special Factors"

An implied cause of action under the Constitution may also be defeated if there are "special factors counseling hesitation in the absence of affirmative action by Congress." *Carlson, supra,* 446 U.S. at 19. Although it is unclear precisely what would constitute a "special factor" sufficient to defeat a *Bivens* action, this Court has taken a narrow, rather than expansive view in defining the scope of the term. In *Davis* v. *Passman, supra,* it was held that in a suit against a Congressman for alleged unconstitutional employment practices, those special factors which the Court was bound to consider did not extend further than the limits of the Speech or

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"[e]mployees express general skepticism about the very possibility of their being effectively protected against reprisals." Merit Systems Protection Board, *Do Federal Employees Face Reprisal for Reporting Fraud, Waste or Mismanagement?* 4, 5 (1981). Respondent Fitzgerald's own experience shows the inadequacy of the existing remedies. This Spring, nearly twelve years after his firing and eight years after he was ordered to be reinstated, the district court found that he had still not been reinstated to an equivalent position. Fitzgerald v. Hampton, No. 76-1486 (D.D.C. March 3, 1981).

Debate Clause of the Constitution.[9] 442 U.S. at 246. Beyond the Speech or Debate Clause, Members of Congress, despite their special status as legislators, were subject to suit as are ordinary persons. *Id.*, *citing Gravel* v. *United States*, 408 U.S. 606, 615 (1972).

Similarly, the position of Petitioners in the executive branch is not in itself, in the absence of an express Constitutional provision, a "special factor." Presidents are clearly amenable to judicial process. As the Court noted long ago, and recently affirmed:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

United States v. *Lee*, 106 U.S. 196, 220 (1882), *quoted in Davis* v. *Passman*, 442 U.S. 228, 246 (1979).

Moreover, Petitioners' cannot persuasively argue that the possibility that officials might be inhibited from the legitimate exercise of their responsibilities by fear of liability is a "special factor."[10] *Carlson, supra* at 19. This policy question may be an appropriate concern in determining the degree of immunity Petitioners might possess; however, it is inappropriate in determining

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[9] Some Members of Congress believe that the Speech or Debate Clause itself was too narrowly interpreted in this case. Whatever the merits of *Davis*, or the applicability of its particular circumstances to other cases that may arise, it is nevertheless correct to state that only Congress can enjoy its provisions. There is no express Constitutional doctrine analogous to the Speech or Debate Clause applicable to the executive branch.

[10] Petitioners, unless they acted entirely outside the scope of their authority, possess qualified immunity under Butz v. Economou, 438 U.S. 478 (1978), which should provide more than adequate protection. Only where, as here, it can be factually demonstrated that the President and his top aides had direct personal involvement in a violation of Constitutional or statutory rights, is a lawsuit naming such individuals as defendants likely to survive a motion to dismiss or for summary judgment.

whether Respondent has a cause of action in the first place. As this Court said, "[a] federal official contemplating unconstitutional conduct . . . must be prepared to face the prospect of a *Bivens* action." *Id.* at 25.

Petitioners rely on the Fifth Circuit's decision in *Bush* v. *Lucas*, for the proposition that the government's need to manage its personnel efficiently is sufficient to constitute a special factor defeating an implied cause of action. 647 F.2d 573 (5th Cir.) *cert. pending*, 40 U.S.L.W. 3176 (Sept. 4, 1981) (No. 81-469). To reach that result, the court in *Bush* v. *Lucas* misapplied this Court's decisions in *Bivens* and *Carlson*.[11] There is no reason to believe that executive action in the personnel area is unreviewable. *See Service* v. *Dulles*, 354 U.S. 363 (1957). *See also Sonntag* v. *Dooley*, 650 F.2d 904 (7th Cir. 1981). The argument for reviewability is particularly strong, where, as here and unlike *Bush*, the personnel action was taken by officials who are far removed from the normal chain of command and who acted in direct

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[11] *See also* Bishop v. Tice, 622 F.2d 349 (8th Cir. 1980), where it was said that existence of remedies under the Civil Service Act providing for reinstatement and back pay were a special factor, precluding relief under the Constitution. The court there also misapplied *Bivens*. In any event, both *Bush* and *Bishop* are distinguishable. *See infra*. Under *Carlson*, a *Bivens* claim will be dismissed if there is an explicit Congressional determination that an alternative remedy was intended to substitute for and provide an equally effective remedy as recovery under the Constitution. Neither court found that Congress explicitly intended the Civil Service Laws to be such an alternative. Having failed to do so, however, the *Bush* and *Bishop* courts strained to fit within the other prong of the *Carlson* analysis, "special factors counseling hesitation." Instead of focusing on whether there existed an equally effective substitute, these courts believe it sufficient to defeat a *Bivens* claim that there is any substitute at all. If *Bush* and *Bishop* are good law, then the test enunciated by this Court in *Bivens* and *Carlson* will have been effectively reduced from two prongs to one. No purpose can be served in examining Congressional intent surrounding a particular statutory remedy if the statute, rejected as a substitute for a *Bivens* remedy, can still be considered a "special factor" precluding a *Bivens* remedy.

contravention of at least two statutes. 5 U.S.C. § 7211; 18 U.S.C. § 1505.

Finally, even if there are "special factors," they are irrelevant, since there has been ample affirmative action by Congress. Time and time again Congress has tried to impress upon the executive branch the importance with which it views the need to receive testimony from federal employees, free from executive branch reprisals. *See, e.g.*, 5 U.S.C. § 7211; 18 U.S.C. § 1505; 5 U.S.C. § 2302(b)(8). Retaliation against a witness like Fitzgerald harms not only the individual but erodes the foundation of our democratic system of government.

III. AN IMPLIED CAUSE OF ACTION EXISTS UNDER A FEDERAL STATUTE

The central question in determining whether a private cause of action should be implied from a federal statute is whether Congress *intended*, implicitly or explicitly, to confer a private right to bring suit.[12] *Middle-*

[12] The Court has identified four factors to aid in determining whether Congress intended to create a private right of action:

> First, is the plaintiff "one of the class for whose special benefit the statute was enacted," . . . —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And, finally, is the cause of action one traditionally delegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78 (1975) (emphasis in original omitted). A private right of action under 5 U.S.C. § 7211 satisfies these four factors: First, the statute creates a federal right for federal employees, including Mr. Fitzgerald; second, the legislative history indicates that Congress intended, implicitly, a private right of action; third, private suits are not only consistent with but necessary to the Congressional purposes of deterring Presidential interference with the rights established in the statute; and, fourth, no state concern is implicated by this case.

sex County Sewage Authority v. *National Sea Clammers Ass'n*, 102 S.Ct. 2615, 2622 (1981); *Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, 101 S.Ct. 2061, 2066 (1981); *California* v. *Sierra Club*, 101 S.Ct. 1775, 1779 (1981). Legislative intent "may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18 (1979). The language, legislative history and structure of 5 U.S.C. § 7211 all demonstrate that Congress intended to create a private right of action.

Section 7211 of Title 5 provides, in relevant part, "[t]he *right* of employees, individually or collectively, to petition Congress . . . or to furnish information . . . may not be interfered with or denied." This language clearly confers a federal right on a class of persons—federal employees—to which Fitzgerald belongs. And it explicitly confers that right on *each* of them, "individually." As this Court has noted:

> [n]ot surprisingly, the right—or duty—creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action. With the exception of one case, in which the relevant statute reflected a special policy against judicial interference, this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case.

Canon v. *University of Chicago*, 441 U.S. 677, 690 n.13 (1979). Not only does this language on its face conclusively confer on federal employees the right to testify before Congress without reprisal, but it is similar to language used in other statutes under which this Court has implied private rights of action.[13] *See Johnson* v.

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[13] The Court has indicated that, "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action

Railway Express Agency, Inc., 421 U.S. 454 (1975) (42 U.S.C. § 1981); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969) (42 U.S.C. § 1982); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969) (42 U.S.C. § 973(c)). *See also Canon, supra*, 441 U.S. 677 (1979) (20 U.S.C. § 1681).

The legislative history also demonstrates that Congress intended to create a private right of action under 5 U.S.C § 7211. The statute was originally part of the Post Office Appropriations Bill of 1912, which represented a Congressional response to a Presidential order [14] prohibiting federal employees from testifying directly to Congress. Ch. 389, § 6, 37 Stat. 539. Contrary to Petitioners' assertion that the bill's primary purpose was to protect the legislative process, Brief for Pets. Harlow & Butterfield at 26, the real concern in Congress was that the rights of federal employees under the First Amendment to free speech were being violated.[15] *See*

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would be controlling." *Cort, supra*, 442 U.S. at 82; *Transamerica, supra*, 444 U.S. at 23; *Canon, supra*, 441 U.S. at 694. In such situations, unless Congress explicitly denied a private right of action it is untenable to presume that Congress provided a right without a remedy.

[14] *See* Exec. Order No. 1142 (Nov. 26, 1909).

[15] This concern was clearly indicated by the remarks of Representative Rouse:

> This bill was for the purpose of placing all employees on the same footing with all American citizens and giving to these employees the right of free speech and petition—that which has been taken from them and denied to them by orders which have been issued by the several departments and which has been more strictly enforced by the post-office authorities . . . it gives to them the right to present grievances to Congress or any Member thereof, and should an employee avail himself of this opportunity it shall not be cause for a reduction in rank, compensation, or removal from the service. This provision simply places all employees on the same footing with all other American citizens which should never have been otherwise, and restores to them the rights guaranteed by the Constitution.

48 Cong. Rec. 5080 (1912).

S. Rep. No. 388, 62d Cong., 2d Sess. 11 (1912). In addition, Congress was concerned that information about executive departments, and possible abuses, was not available from the best sources, the employees of those departments. *See* 48 Cong. Rec. 4653 (1912) (remarks of Rep. Calder); *id.* at 4693 (remarks of Rep. Moon); *id.* at 5000 (remarks of Rep. Austin); *id.* at 5157 (remarks of Rep. Evans).

As enacted, the statute makes it a violation of federal law to impede in any way the right of a federal employee to testify before Congress. Congress enacted the statute specifically to restrain the President and high executive officials who were interfering with the ability of federal employees to communicate with Congress. Congress specifically intended to prevent the President from doing what he did in this case. It is inconsistent with this legislative intent to deny Fitzgerald a private right of action.

Finally, the structure of section 7211 indicates that Congress intended to create a private cause of action. Section 7211 does not itself contain an enforcement mechanism and at the time of its enactment no other provision offered any remedy to Congressional witnesses.[16] Thus, if it did not establish a private cause of action,

[16] The criminal penalties of 18 U.S.C. § 1505 were enacted in 1940. This provision also contains an implied private cause of action. In *Cort* v. *Ash*, this Court recognized that the possibility of a criminal penalty does not necessarily preclude implication of a private cause of action for damages. 442 U.S. at 79. Section 1505 is not a "bare criminal statute" aimed at protecting the public at large; rather, it is sufficiently protective of a special group—witnesses before government instrumentalities—to give rise to a private cause of action by a member of that group. 442 U.S. at 80. This statute, like section 7211, grew out of a Congressional concern that witnesses be able to testify free from reprisal. H.R. Rep. No. 1143, 76th Cong., 1st Sess. 1 (1940). And where, as here, the defendant is the President, an implied cause of action is essential to implement the policy of the statute for all of the reasons stated above.

section 7211 was just an empty declaration in the air. It cannot be that this was all that Congress intended in enacting that law.

IV. EXECUTIVE OFFICIALS WHO PUNISH A GOVERNMENT EMPLOYEE FOR HIS TRUTHFUL TESTIMONY BEFORE CONGRESS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY

The appropriate scope of immunity for top-level officials in the executive branch should not be decided without regard to the serious problem absolute immunity poses for the Constitutional role of Congress. Petitioners' arguments in favor of absolute immunity are couched solely in terms of the isolated interests of the Presidency and completely ignore how such a role of insulated executive autonomy would jeopardize the effectiveness of Congress and undermine the Constitutional system of separation of powers.

Petitioners ask this court to establish a broad and dangerous new precedent by extending the existing doctrine of official immunity in two ways. First, they seek immunity for activities which are clearly beyond the outer perimeter of executive power; until now the immunity doctrine has been invoked exclusively to protect officials for conduct within the scope of their authority. Second, while executive officials have heretofore been entitled to the ample protection afforded by qualified immunity, Petitioners maintain that they should be bestowed, solely by virtue of their important positions within the executive branch, with a mantle of absolute immunity. Expansion of the immunity doctrine is, we submit, unwarranted because it is unnecessary to protect the claimed prerogatives of the Presidency and would frustrate the ability of Congress to perform its essential oversight and legislative functions. The competing executive and legislative interests involved in this case cannot be reconciled by providing Petitioners with absolute immunity.

A. The Immunity Defense is Unavailable to Executive Officials Who Act Outside The Scope of Their Authority by Interfering with A Congressional Witness

Notwithstanding the justifications for the doctrine of official immunity,[17] the immunity defense is only applicable to an official's action taken within the scope of his authority. *Butz* v. *Economou*, 438 U.S. 478, 489-91 (1978). The rule has long prevailed that a federal official may not with impunity ignore the "jurisdictional" limitations which the controlling law has placed on his powers. *Id.* at 489. This Court has never purported to grant immunity of any kind to any official who has manifestly or palpably overreached his authority or wrongfully exceeded clear Constitutional or statutory boundaries on the proper exercise of his authority, and there is no valid reason to do so. *Id.* In short, the doctrine of official immunity is utterly unavailable when a government figure has "wandered completely off the official reservation." *See id.* at 519 (Rehnquist J., concurring in part, and dissenting in part).

All of Petitioners' arguments that they deserve the benefits of absolute immunity ignore the threshold question of whether they are entitled to even qualified immunity, since their misconduct, although occurring while Petitioners were members of the executive branch, was

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[17] There are three generally accepted rationales for official immunity. The first is the unfairness of penalizing an official for activity he is required to take because of the legal obligations of his position. The second is the deterrence of able people from holding public office and the fear of dampening "the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." The third is the distraction of officials from the public business by the time and effort needed for defending lawsuits. Scheuer v. Rhodes, 416 U.S. 232 (1974); Gregoire v. Biddle, 177 F.2d 579, 581 (3d Cir. 1949). *See* Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and Critique*, 72 Nw.L.Rev. 526 (1978).

not within the farthest reaches of a legitimate exercise of Presidential power.[18]

In this case there is no immunity because the complained of conduct is both unauthorized and prohibited by statute. Petitioners did, in fact, wander "completely off the official reservation." First, Petitioners were not authorized to discharge a specific government employee in a Congressionally established department.[19] Since the alleged wrongdoing was not related to matters committed by law to Petitioners' supervision and control they cannot avail themselves of the immunity defense. *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896).

Second, and most important, even if the discharge of a particular government employee could be deemed to be otherwise authorized, the misconduct alleged in this case—termination because of the employee's Congressional testimony—is clearly beyond the scope of Presidential power because it is expressly prohibited by statute. 5 U.S.C. § 7211; 18 U.S.C. § 1505.[20] The Court's analysis of *Barr* v. *Mateo* in *Butz* v. *Economou* demonstrates that there is no immunity defense in this situation. 438 U.S. at 489. In *Barr* v. *Mateo*, the Court

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[18] The President's powers, though broad, are not limitless. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[19] While these executive officials may have general responsibilities with regard to government personnel policy within the executive branch, the forced dismissal of a single individual is not a matter committed by law to executive branch officials at the highest level. Certainly, in the course of performing their duties, Petitioners did not normally devote their attention to decisions to hire, promote, or fire particular government employees in positions comparable to the one held by Fitzgerald.

[20] When Congress exercises its power to vest appointment of an inferior officer in the head of an executive department, U.S. Const. Art. II, § 2, cl. 2, Congress may validly limit the conditions under which the officers may be removed. Myers v. United States, 272 U.S. 52 (1926); United States v. Perkins, 116 U.S. 483 (1886).

held that an official's publication of a false and damaging press release, the issuance of which was otherwise within his authority, was not itself actionable. 360 U.S. 564 (1959). But *Butz* explained that had the press release been unauthorized, "and surely if the issuance of press releases had been expressly forbidden by statute" then the claim of absolute immunity would not have been upheld. 438 U.S. at 489.

Congress has enacted statutes expressly forbidding anyone from interfering with the testimony of Congressional witnesses. Indeed section 7211 was passed specifically to prohibit Presidential interference with Congressional witnesses. This prohibited conduct also rises to the level of Constitutional violations, since it restricts the right of free speech and the right to petition Congress. If any inference is to be drawn from relevant Supreme Court precedent, it is that Petitioners are not excused from liability arising from their alleged deliberate failure to observe these well established and unambiguous statutory and Constitutional limitations on their powers. *Butz, supra*, 438 U.S. at 494; *Spalding* v. *Vilas*, 161 U.S. 483 (1896).

B. Petitioners Cannot Carry Their Burden of Establishing the Need for Absolute Immunity

Executive officials may be granted absolute immunity only if public policy requires this extraordinary exemption from personal liability, and Petitioners bear the burden of proof on that question. *Butz, supra*, 438 U.S. at 507. It is apparent that Petitioners cannot possibly satisfy this test, in part because absolute immunity leaves unprotected the vital public interest in full disclosure by Congressional witnesses. Thus, under the prevailing standard Petitioners are entitled to no more than qualified immunity even if qualified immunity would impose additional burdens on the executive branch. Realistically, qualified immunity offers very extensive protection to executive officers, and therefore, Petitioners' speculations

about its dire consequences in terms of impeding the performance of Presidential duties are unfounded.

1. *Public Policy Requires Only The Protection of Qualified Immunity*

Absolute immunity is an extraordinary defense which has only been available in narrow circumstances not analogous to the present suit.[21] Indeed, this Court has stated that absolute immunity for federal officials who knowingly and deliberately violate Constitutional rights "is contrary to the course of decision in this Court from the very early days of the Republic." *Butz, supra*, 438 U.S. at 487. Therefore, when executive officials are accused of violations of Constitutional and statutory rights, as they are here, they are generally afforded only a qualified immunity from liability.[22] *Id.* Guided by the fundamental principle that "no man in this country is so high that he is above the law," *id.* at 506, *quoting United States* v. *Lee*, 106 U.S. 196, 220 (1882), this Court has imposed a very stringent burden on those federal officials

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[21] Executive officials, unless acting in a quasi-adjudicatory capacity, have not been extended the absolute immunity afforded to judges, Pierson v. Ray, 386 U.S. 547 (1967), or prosecutors when they are functioning in a quasi-judicial capacity. Imbler v. Pachtman, 424 U.S. 409 (1976). Nor do executive officials enjoy the immunity afforded to federal lawmakers by the Speech or Debate Clause of the Constitution or to state and local legislators by case law. Tenney v. Brandhove, 341 U.S. 367 (1951); Lake Country Estates, Inc., v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). In *Halperin* v. *Kissinger*, the D.C. Circuit refused to extend the absolute immunity of legislators to the President. 606 F.2d 1192, 1213 (D.C. Cir. 1979). *See also* Prosser, *The Law of Torts*, 4th Ed. 1971, § 132 (cases collected).

[22] Petitioners advocate an irrational distinction between Constitutional and statutory causes of action, arguing that common law absolute immunity precludes suit for the intentional violation of a federal statutory right. This distinction is indefensible, and more significantly, it is not the law. Butz v. Economou, 438 U.S. at 490-494. *See* Brief for Resp. at 47. Of course, the statutes involved here were enacted to vindicate the Constitutional rights of government employees.

who seek an exception from the established rule of qualified liability. In order to justify absolute immunity, Petitioners "*must bear the burden of showing that public policy requires an exemption of that scope.*" *Butz, supra,* 438 U.S. at 507 (emphasis added).

Petitioners cannot meet this exacting standard for justifying absolute immunity. Their predictions about the adverse effects of qualified immunity are unfounded. The doctrine of qualified immunity, as articulated by this Court, provides a "sliding scale" of protection which varies according to an official's duties and the totality of the circumstances in which the official must act. *Scheuer* v. *Rhodes,* 416 U.S. 232, 247-49 (1974). *See also Apton* v. *Wilson,* 506 F.2d 83, 93 (D.C. Cir. 1974); *Halperin* v. *Kissinger,* 606 F.2d 1192, 1212 (D.C. Cir. 1979). This immunity is necessarily very great for the President because of the broad scope of his discretion, the wide responsibilities of his office, the demands on his time and the exigent circumstances under which he frequently acts. *Kissinger, supra,* 606 F.2d at 1212. The immunity could only be pierced in the event a plaintiff could prove that the President acted with actual malice or that he failed to meet a statutory or Constitutional obligation that was clear under the circumstances or understood at the time. *Id. See Scheuer* v. *Rhodes,* 416 U.S. at 246-47.

It will be a rare case where a plaintiff can prove such facts, or even point to evidence to contradict defendants' affidavits and raise a genuine issue of material fact sufficient to survive a motion for summary judgment. But this is such a case, because the nature of the evidence, including the availability of the White House tapes, shows direct Presidential involvement and illuminates the Presidential motives. Only in such a case will qualified immunity, quite properly, fail to provide complete protection to those who abused their public trust.

Not only can Petitioners not show that public policy requires absolute immunity, but strong reasons of public

policy militate *against* their claim. First, Petitioners' extraordinary claim would enable the executive branch to control and distort the facts available to Congress, thus creating both an intrusion and an impediment to the legislative function of Congress. Furthermore, whatever credence might otherwise be given to Petitioners' concerns about the Presidency, it is inconceivable that the proffered rationale for absolute immunity has any merit with respect to the exceedingly narrow and rare type of case that is now before the court: *i.e.*, where the President is alleged to have deliberately sought to undermine the ability of another branch to perform its own Constitutional function. In these circumstances, whatever special deference might be due the Presidency in other contexts can have no controlling weight.

2. *Petitioners Are Not Entitled to Absolute Immunity By Virtue of the Nature of their Office*

Unable to satisfy the existing public policy test for justifying absolute immunity, Petitioners have attempted to argue that the President and his closest advisors are entitled, solely by virtue of their high office, to a special new grant of absolute immunity. Petitioners have taken the position that even if they were directly responsible for Fitzgerald's discharge, even if their motivation was punitive, and even if their conduct was designed to intimidate others from giving candid testimony to Congress, the President and his top-level White House personnel are nonetheless completely immune from suit because of the need to safeguard the President's executive functions. *See* Brief for Pet. Nixon at 5. But the Court has consistently rejected the notion that greater rank merits greater protection from suit. *Butz*, *supra*, 438 U.S. at 506. Rather, the Court has recognized that:

> The greater power of such [higher] officials affords a greater potential for a regime of lawless conduct. Extensive government operations offer opportunities for unconstitutional action on a massive scale.

Id. This reasoning is even more compelling in the present case, which involves not only the preservation of private rights but also the need to vindicate the public rights embodied in Congressional enactments.

Rather than determining the immunity issue according to title or status, as Petitioners advocate, the Court has instead analyzed the functions performed by officials claiming immunity. The Court, for example, concluded on the basis of this analysis that the "special functions" of judges and of prosecutors require a full exemption from liability. *Butz, supra,* 438 U.S. at 508. But the Court stressed that this exemption applied to these officials only "in the exercise of their judicial functions." [23] *Id.* The Court stated that:

> [t]he cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process . . . Absolute immunity is thus necessary to assure that judges, advocates and witnesses can perform their respective functions without harassment or intimidation . . . At the same time, the safeguards built into the judicial process tend to reduce the need for private damages actions as a means for controlling unconstitutional conduct.

Id. at 512.[24] Executive officials functioning in quasi-

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[23] Similarly, prosecutors can be liable for damages arising out of actions unrelated to their prosecutorial functions, such as arranging for mass arrests. Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974). *See* Walker v. Cahalan, 542 F.2d 681 (6th Cir. 1976); Martin v. Merola, 532 F.2d 191 (2d Cir. 1976) (issuing press releases). And legislators are not immune for conduct that is not part of their legislative activities. Davis v. Passman, *supra*; Hutchinson v. Proxmire, 443 U.S. 111 (1979).

[24] Judges to varying degrees are insulated from political pressure, governed by precedent, and subject to review and reversal on appeal. Pierson v. Ray, 386 U.S. 547, 554 (1967); Stump v. Sparkman, 435 U.S. 349, 369-70 (1978) (Powell, J., dissent-

judicial roles have also been afforded absolute judicial immunity because there are safeguards in agency adjudications similar to those found in traditional litigation. *See id.* at 512-17. In comparison to these executive adjudicators, the actions of the executive officials named in this lawsuit were virtually irreversible.

In each case where the special functions of an official have been found to require absolute immunity, the Court has undertaken "a considered inquiry into the immunity historically afforded the relevant official at common law and the interest behind it." *Id.* at 508; *Imbler* v. *Pachtman*, 424 U.S. 409, 421 (1976). This approach also does not reveal any basis for the new precedent Petitioners desire. Judges [25] and legislators [26] had long been accorded absolute immunity at common law. In contrast, private actions for damages against executive officials were recognized at common law as an important means for redress of individual wrongs.[27] *See Payton* v. *New*

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ing); Apton v. Wilson, 506 F.2d 83, 93-94 (D.C. Cir. 1974). Prosecutors are similarly hemmed in by public adversary systems and the availability of appeal. No such restraints apply to executive action.

[25] *See* Floyd v. Barker, 77 Eng. Rep. 1305 (Star Chamber 1607): The Case of the Marshalsen, 77 Eng. Rep. 1027 (C.P. 1613); Terry v. Huntington, 145 Eng. Rep. 557 (Ex. 1659). *See also* Prosser, *supra*, § 132, 987 nn. 76-77.

[26] *See* 1 W & M., Sess. 2, C.11 (1688) ("The freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of parliament.") *See also* Prosser, *supra* at 988.

[27] Of course, suits against the King were not cognizable. Under the theory of divine right and the common law "The King could do no wrong," 3 Holdsworth, *History of English Law*, 5th Ed. (1942), 458-69. But this maxim marks an obvious point of departure for history and American jurisprudence. *See* Prosser, *Law of Torts*, 4th Ed. 1971 § 131, 971. In any event, English historical antecedents are of limited relevance to the immunity inquiry. Policy grounds and not legal fictions should determine the result. *See* Freed, *supra* at 529.

York, 100 S.Ct. 1371, 1391 (1980) (White, J. dissenting); *Marcus* v. *Search Warrant*, 367 U.S. 717, 729 (1961); *Boyd* v. *United States*, 116 U.S. 616, 624-25 (1886).

Nor is there any textual evidence that the Constitution exempts the President from all liability in cases like this. While Congressmen enjoy the privileges of the Speech or Debate Clause of Article 1,

> [t]he Constitution makes no mention of special Presidential immunities. Indeed, the executive branch generally is afforded none. This silence cannot be ascribed to oversight.

Halperin v. *Kissinger*, 606 F.2d 1192, 1211 (D.C. Cir. 1979); *Nixon* v. *Sirica*, 487 F.2d 700, 711 (D.C. Cir. 1973) (en banc).

The Constitution does specify, however, that an impeached President may still be tried in the courts for any offense. U.S. Const., Art. 1 § 3, cl. 7.

> By contemplating the possibility of post impeachment trials for violations of law committed in office, the Impeachment Clause itself reveals that incumbency does not relieve the President of the routine legal obligations that confine all citizens.

Nixon, *supra*, at 711. The deliberations of the Framers of the Constitution are silent on the specific question of whether the President was to be immune from suits for money damages arising out of conduct while in office.[28] What is clear from the debates, the contemporaneous writings of the Framers, and the Constitution itself, is that the President was to be subject to the law rather than above it, in contrast to the King of England. U.S. Const. Art. I, § 3; Art. II, § 3, § 4; II J. Elliott, *supra*,

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[28] There is some evidence that the Constitutional Convention was presented with the question of Executive privileges and chose not to grant any. *See* 3 M. Farrand, *The Records of the Federal Convention of 1787* (1937) 385, 605-06; 2 M. Farrand, *supra*, at 903; Halperin v. Kissinger, 606 F.2d 1192, 1211, n.129 (D.C. Cir. 1979).

480 (1836); IV Elliott *supra*, at 114). *See The Federalist*, No. 69, No. 77 (A. Hamilton).

Otherwise, the Constitutional scheme betrays no indication that any kind of immunity was intended for the President or the executive branch. On the contrary, the doctrine of separation of powers provides a Constitutional imperative for denying Petitioners the autonomy they seek. In one key case, a three judge court has succinctly described a useful approach to separation of powers questions which illuminates the issues presented by this case:

> [S]eparation of powers questions are to be resolved by analyzing with particularity the extent to which an act by one branch prevents another from performing its assigned duties and disrupts the balance among the coordinate departments of government. To the extent such interference is perceived, the inquiry must then shift to considering whether the impact on one branch of government is justified by the need to pursue objectives whose promotion is assigned by the Constitution to a different branch.

Nixon v. *Administrator of General Services*, 408 F. Supp. 321, 342 (D.D.C. 1976) (three-judge court), *aff'd*, 433 U.S. 425 (1977).

Under this framework the result is clear. The impact on Congress of absolute immunity would be devastating. Absolute immunity would enable the executive branch to undermine Congress' legislative and informing functions. If the President and his advisors are harmed at all by application of the doctrine of qualified immunity, that harm is far outweighed by the benefits to Congress.

Finally, absolute immunity should not be adopted on the mistaken ground that it would prevent improper judicial intrusion into executive matters. "Clearly, a proper regard for separation of powers does not require that the courts meekly avert their eyes from Presidential excesses while invoking a sterile view of three branches of government entirely insulated from each other." *Hal-*

perin v. *Kissinger*, 606 F.2d at 1212, *citing Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 635. This case presents the court with a classic conflict between Congress and the Executive. The Court has been an arbiter of such interbranch disputes, and an interpreter of the Constitution. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

CONCLUSION

For the reasons stated above, the proper result is for this Court to deny the Petitioners absolute immunity in this case. Petitioners should be subject to personal liability for damages arising from their unconstitutional and illegal conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion For Leave To File Brief *Amicus Curiae* and Brief *Amicus Curiae* of Senator Orrin G. Hatch and Representatives John D. Dingell, Robert K. Dornan, Barney Frank, Albert Gore, Jr., A. Toby Moffett, and Patricia Schroeder, Members of Congress in support of RESPONDENT, has been served this 30th day of October, 1981, in the manner indicated:

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